(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUN 20 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The matter will be remanded to the director for further action, consideration, and the entry of a new decision in accordance with the decision below.

The petitioner claims to be a software company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Alien Employment Certification (labor certification) approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not qualify for the second preference classification as the beneficiary did not meet the job qualifications stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a single degree that is the foreign equivalent of a U.S. bachelor's degree.

On appeal, counsel submits that the beneficiary's single foreign degree is the equivalent of a four-year U.S. bachelor's degree.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation at 8 C.F.R. § 204.5(k)(4) also provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.)

It is important to note that the DOL's role in the employment-based immigrant visa process is limited to determining whether there are sufficient U.S. workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a). It is significant that none of the responsibilities assigned to the DOL, nor the remaining regulations implementing these duties at 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or the job offered. Instead, the authority to make this determination rests solely with U.S. Citizenship and Immigration Services (USCIS). *See Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983).

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the minimum education, training, experience and skills required to perform the offered position. It is important that the ETA Form 9089 be read as a whole.

In the instant case, the labor certification states that the position has the following minimum requirements:

H.4.	Education: minimum level required:	Bachelor's
H.4-B.	Major Field of Study:	Computer Science

H.5.	Is training required in the job opportunity?	No
H.6.	Is experience in the job offered required for the job?	Yes
H.6-A.	If Yes, number of months experience required:	60
H.7.	Is there an alternate field of study that is acceptable?	Yes
H.7-A.	If Yes, specify the major field of study:	Engineering, math, business administration or related
H.8.	Is there an alternate combination of education and experience that is acceptable?	No
H.9.	Is a foreign educational equivalent acceptable?	Yes
H.10.	Is experience in an alternate occupation acceptable?	Yes
H.10-A.	If Yes, number of months experience in alternate occupation required:	60
H.10-B.	Identify the job title of the acceptable alternate occupation:	"programmer, analyst, engineer, developer, consultant, lead, developer,"
H.14.	Specific skills or other requirements:	"any suitable combination of training, education or experience is acceptable."

As set forth above, the proffered position requires a minimum of a Bachelor's degree in Computer Science (or engineering, math, business administration or related) and five years of experience in the job offered as a software engineer, or five years in related occupations as a programmer, analyst, engineer, developer, consultant, or lead, in order to qualify for the position.

On the ETA Form 9089, signed by the beneficiary, the beneficiary represented that the highest level of education that he achieved was a Bachelor's degree in Engineering, obtained in 2003 from [redacted] As noted, counsel contends that the beneficiary's foreign bachelor's degree is the foreign equivalent to a four-year U.S. bachelor's degree in engineering.

The record contains a copy of the beneficiary's Bachelor of Engineering degree, with a field of study in "Electronics and Communication Engineering," dated September 2, 2003. The record also contains transcripts from [redacted] for the beneficiary's third to eighth semester of study there. The record also contains the beneficiary's three-year diploma in "Electronics and Communications Engg. (D. EC. E)" issued by a polytechnic college, [redacted] Nandyal, India, in 1999.[2]

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to

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[2] The record contains an evaluation of the beneficiary's credentials, dated July 18, 2012, by Dr. [redacted] which noted that the beneficiary's three-year diploma from the polytechnic program granted the beneficiary standing for admission into the second year of the Bachelor of Engineering program a [redacted]

its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx (accessed June 4, 2013 and incorporated into the record of proceeding). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php (accessed June 4, 2013). Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[3] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[4]

EDGE states that a Bachelor of Engineering degree in the Indian educational system is awarded upon completion of four years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents the attainment of a level of education comparable to a bachelor's degree in the United States. Upon review of the entire record, the AAO concludes that the record demonstrates that the beneficiary has a single degree that is the foreign equivalent of a U.S. bachelor's degree. The director's decision in regards to the beneficiary's degree will be withdrawn. However, the petition is not currently approvable, as is discussed below. Therefore, the matter will be remanded to the director.

Beyond the decision of the director, the record does not establish that the beneficiary has the requisite five years of employment experience as required by the terms of the labor certification. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. at 159; *see also Matter of Katigbak,* 14 I&N Dec. 45,

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[3] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

[4] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano,* 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

49 (Reg'l Comm'r 1971). As previously noted, in evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

The labor certification in this case requires a minimum of five years of work experience as a software engineer, or in the related occupations of programmer, analyst, engineer, developer, consultant, or lead, in order to qualify for the proffered position. The labor certification indicates that the beneficiary gained approximately two and half years of the requisite experience as an engineer in a full-time capacity from December 1, 2003 to March 26, 2005 at , India, and from March 28, 2005 to June 20, 2006 at India. Further, the labor certification states that the beneficiary was employed as a technology lead in a full-time capacity from July 3, 2006 to October 18, 2011 at , Texas. The record contains employment certificates from all three of the beneficiary's prior employers to corroborate this information. The certificates, however, fail to meet the requirements of 8 C.F.R. § 204.5(g)(1), which require that the employer letters contain the name, address, and title of the employer, and a description of the beneficiary's experience and duties. In this case, none of the employment certificates set forth any description of the beneficiary's training, experience or job duties, particularly for his position as a technology lead with Infosys Limited. Moreover, the AAO notes that although the labor certification indicates that is a company located in Plano, Texas, the beneficiary's employment certificate from that company is for a place of business located in India. It is incumbent upon the petitioner to resolve any inconsistencies in the record such as this by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Accordingly, the matter will be remanded to the director to provide the petitioner the opportunity to demonstrate that the beneficiary satisfies the minimum experience requirements of the offered position and to resolve discrepancies in the record relating to the beneficiary's employment history.

Additionally, beyond the decision of the director, the evidence of record also does not establish the petitioner's ability to pay the beneficiary the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on February 1, 2012. The proffered wage as stated on the ETA Form 9089 is $101,108.80 per year.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2006 and to currently employ 95 workers. However, the petitioner's 2011 tax return in the record indicates that it was established on April 1, 2007. In addition, a search of business entities registered with the Pennsylvania Department of State indicates that the petitioning business was created on December 24, 2009. *See https://www.corporations.state.pa.us/corp/soskb/* (last accessed June 11, 2013). The record does not contain an explanation for this discrepancy. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Thus, on remand, the petitioner must address and provide an explanation for this inconsistency.

According to the tax returns, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on June 22, 2012, the beneficiary did claim to have worked for the petitioner from October 19, 2011 to the signature date.

As an initial matter, the AAO notes that the record lacks evidence pursuant to 8 C.F.R. § 204.5(g)(2), in the form of a federal tax return, annual report, or audited financial statement from the 2012 priority date onward. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation at 8 C.F.R. § 204.5(g)(2). In this case, the record contains only the petitioner's 2011 tax returns, which is from before the February 1, 2012 priority date. At the time of the filing of the Form I-140, Immigrant Petition for Alien Worker, and the subsequent appeal of the denial of that petition, the petitioner's 2012 taxes were not yet due. However, as of the date of this decision, the petitioner's 2012 tax return should be available and is required in the determination of the petitioner's ability to pay the proffered wage. Thus, on remand, the petitioner must submit its annual report, federal tax return, or audited financial statement for 2012 to demonstrate its ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may submit the beneficiary's Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, or Form 1099, Miscellaneous Income, for each year from the priority date.

In addition, according to USCIS records, the petitioner has filed I-140 petitions and nonimmigrant petitions (Form I-129, Petition for Nonimmigrant Worker) on behalf of numerous other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not

document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, on remand, the petitioner must provide this information in order to establish its continuing ability to simultaneously pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

In view of the foregoing, the director's decision of August 10, 2012, denying the petition, will be withdrawn. However, the petition is not presently approvable as the record fails to establish that the beneficiary possessed the minimum qualifications for the position offered, or that the petitioner possessed the ability to pay the beneficiary the proffered wage. The petition is remanded to the director for consideration of these issues, and any other issue the director deems appropriate. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review and consider the entire record and enter a new decision.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The decision of the director is withdrawn. However, the petition is not approvable based on the current record of proceeding. The petition is remanded to the director for further proceedings consistent with the foregoing and for entry of a new detailed decision.